92-1883

Supreme Court, U.S.
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Case Number _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

WILBUR BROWN,

Petitioner,

v.

LLOYD BENTSEN, SECRETARY OF THE UNITED STATES TREASURY

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Does the Civil Service Reform Act of 1978, Pub. L. 950454, 92 Stat. 11 ("CSRA"), preempt 5 U.S.C. § 702 and preclude federal court jurisdiction over claims by federal employees seeking equitable remedies for constitutional violations which occurred in connection with their employment?

LIST OF PARTIES

Petitioner Wilbur Brown was the plaintiff and appellant below.

Respondent The Secretary of the Treasury was the defendant and appellee below.

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IN THE SUPREME COURT OF THE UNITED STATES

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Petitioner,

v.

SECRETARY OF THE UNITED STATES TREASURY

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE NINTH CIRCUIT

Petitioner Wilbur Brown respectfully prays that a writ of certiorari issue to review the judgment of the Ninth Circuit Court of Appeal, filed November 18, 1992, of which rehearing and/or rehearing en banc was denied on January 13, 1993.

I. OPINIONS BELOW

The order denying rehearing and/or rehearing en banc is reprinted in the Appendix hereto as Exhibit A, at page 1.

The unreported memorandum opinion of the Ninth Court of Appeal is reprinted in the Appendix hereto as Exhibit B, beginning at page 2.

The unreported memorandum decision of the trial court (Patel, J.) is reprinted as Exhibit C in the Appendix hereto, beginning at page 14.

II. JURISDICTION

The relevant claims by Brown were predicated on the Due Process clause of the Fifth Amendment. The trial court had jurisdiction pursuant to 28 U.S.C. § 1331 and/or 5 U.S.C. § 702.

On October 2, 1990, the trial court, The Honorable Marilyn Hall-Patel presiding, entered judgment in favor of the Secretary. On November 30, 1990, Brown filed a timely notice of appeal. On November 18, 1992, the Ninth Circuit Court of Appeal filed its memorandum opinion affirming the judgment of the trial court. Brown timely filed a petition for rehearing, which was denied by order dated January 14, 1993.

The jurisdiction of this Court to review the judgment of the Court of Appeal is invoked under 28 U.S.C. § 1254(1).

III. STATUTES INVOLVED

The statutes and regulations involved, U.S. Const., 5th Amendment; 5 U.S.C. §§ 701 et seq.; 5 U.S.C. §§ 2301 et seq., 5 U.S.C. §§ 7501 et seq.; and E.O.

10450, are reprinted in the appendix beginning at page 14.

IV. STATEMENT OF THE CASE

A. Overview

As stated previously, the issue presented is whether the Civil Service Reform Act of 1978 ("CSRA"), P.L. 95-454, 92 Stats. 1111, preempts jurisdiction over claims by a federal employee seeking equitable remedies for constitutional violations arising from the employment relationship.[1]

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1. Brown notes that as yet no court has discussed the interplay between the CSRA and 5 U.S.C. § 702 (App. at 16), which grants jurisdiction over claims seeking "relief other than money damages," and which would appear to grant jurisdiction separate from, and not subject to elimination by, the CSRA, an issue that need not be reached until the merits are argued.

By way of background, prior to enactment of the CSRA there was a patchwork of remedies and procedures relating to federal employee rights and remedies. The CSRA, codified in various parts of Title 5, created a uniform system of principals to be applied to all "employees" as defined by 5 U.S.C. § 7501(1).[2] An employee who suffered an adverse personnel action (defined in 5 U.S.C. §§ 7501(2) and 7502[3]), or who has been injured by any prohibited personnel practice (defined by 5 U.S.C. § 2302[4], is provided explicit administrative procedures, with judicial review of agency

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2. See App. at 55.

3. See App. at 55, 56.

4. See App. at 35.

decisions provided for by 5 U.S.C. § 7503[5].

There was, initially, some question about whether the CSRA preempted so-called Bivens[6] claims by federal employees; i.e., claims seeking money damages for employment-related constitutional violations. *Compare* McIntosh v. Weinberger, 810 F.2d 1411, 1434-36 (8th Cir. 1987) (Bivens claims not preempted) and Kotarski v. Cooper, 799 F.2d 1342, 1344-45 (9th Cir. 1986) vacated and remanded 487 U.S. 1212 (1988) (same) *with* Hallock v. Moses, 731 F.2d 754, 757 (11th Cir. 1984) (Bivens claims preempted by

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5. See App. at 56.

6. *See*, Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971) (creating money damages remedy for violation of constitutional rights by government employees).

CSRA).

In Schweiker v. Chiliki, 487 U.S. 412 (1988), this Court held that the remedial provisions of the Social Security Act precluded Bivens claims against agency personnel. Shortly thereafter this Court indicated that Schweiker applied to the CSRA scheme as well. *See*, Kotarski v. Cooper, 487 U.S. 1212 (1988) (remanding appellate court decision that CSRA did not preempt Bivens claims for reconsideration in light of Schweiker.) However, while this Court has, as discussed below, strongly indicated that the CSRA does **not** preempt equitable constitutional claims, the issue has not been squarely decided by the Court, and, as also discussed below, the Circuit Courts have reached contrary conclusions on the question. With the broad issues thus stated, Brown turns to

the specifics of the case at bar.

B. Statement of Facts

In 1981, Brown was acquitted of a murder charge after a jury trial. On June 27, 1987, Brown began working at the United States Mint in San Francisco as a Metal Forming Machine Operator under a temporary appointment not to exceed one year, an appointment later extended to December 6, 1988.

From the beginning, Brown observed that the Mint's Filipino supervisors consistently applied a different, far harsher, standard in judging the work of non-Filipino employees. Brown repeatedly complained about this pervasive discrimination.

In March of 1988, the Mint learned that Brown had been charged with, and

acquitted of, a crime. Mint management asked Brown to sign an authorization allowing access to the police files on the matter. Brown complied.

Some weeks later, Brown was pulled from the workplace and taken to an office. There, he was confronted by a security officer who stated that Brown would have to immediately answer, in writing, a set of written questions regarding the events of eight years before. Brown asked to review the police files, and also asked that he be allowed to read the written questions, rather than answering them as given verbally. These requests were refused, as was Brown's request to consult with an attorney. Brown stated that he could not discuss the matter under the circumstances demanded by the Mint.

After this incident, Brown continued

expressing his concerns about workplace-wide discrimination. Brown voiced the additional complaint that other persons employed at the Mint were convicted felons and had never been asked any questions about the crimes of which they had been convicted, while Brown had been investigated regarding a charge of which he had been acquitted only after complaining of reverse discrimination.

On August 17, 1988 the Mint terminated Brown effective immediately, "due to [Brown's] failure to cooperate in a security investigation, as required by E.O. 10450 for federal government employees." The Merit Systems Protection Board dismissed Brown's appeal because it had no jurisdiction to review claims by temporary employees such as Brown. This action followed.

C. Proceedings Below.

Brown's complaint in the District Court asserted 6 claims for relief: the first three for racial discrimination in violation of 42 U.S.C. § 2000e-16; the fourth count asserted retaliatory firing for whistle blowing; the fifth count asserted denial of due process as to the basis and manner of termination; and the sixth count sought reinstatement as an equitable remedy for all claims presented. Brown's Due Process claim asserted that the Secretary acted illegally in terminating Brown under E.O. 10450, which this Court has repeatedly held is inapplicable to employees who, like Brown, do not occupy national security-related positions.

The Secretary moved to dismiss or, in the alternative, for summary judgment.

The motion to dismiss asserted that Brown's claims were all barred because Brown had not exhausted E.E.O.C. remedies for federal employment-related race discrimination. The motion for summary judgment attacked the merits of each of Brown's claims, asserting that Brown had been justifiably terminated. In opposition to the latter motion, Brown presented evidence controverting nearly a dozen of The Secretary's allegedly undisputed facts, thus precluding summary judgment. However, the trial court granted the motion to dismiss, finding that all of Brown's claims were subject to E.E.O.C. exhaustion.

On appeal, Brown contested only dismissal of the Due Process claim, which was patently not subject to E.E.O.C. exhaustion. The Secretary conceded that

the trial court erred in dismissing the Due Process claim on E.E.O.C. exhaustion grounds, but proffered as an alternative ground for dismissal the new theory that the Due Process claim was preempted by the Civil Service Reform Act ("CSRA"). In reply, Brown noted that the District of Columbia Circuit has repeatedly held that equitable constitutional claims are **not** preempted by the CSRA, and urged the panel here to adopt that position both as better reasoned and because the D.C. Circuit's position is supported by this Court's precedent.

The panel in this case, bound by an earlier Ninth Circuit decision, rejected the D.C. Circuit rule cited by Brown and held that even equitable constitutional claims are preempted by the CSRA. Brown now seeks certiorari.

V. REASONS FOR GRANTING THE WRIT

At the outset, the contours of Brown's Due Process claim must be clarified. The sole basis for Brown's firing by the Mint was his "failure to cooperate in a security investigation, as required by E.O. 10450 for federal government employees." However, on its face, E.O. 10450 only applies to employees who "could bring about, by virtue of the nature of the position, a material adverse effect on the national security." E.O. 10450(3)(b), 18 Fed. Reg at 2489 (App. at 68 et seq.).

This Court has expressly held that E.O. 10450 is inapplicable to employees who, like Brown, who do not occupy sensitive positions involving national security, and that such employees have a Due Process claim if E.O. 10450 is applied

to them. Cole v. Young, 351 U.S. 536, 544 (1956) (E.O. 10450 can be applied only to employees whose "activities are directly concerned with the protection of the Nation from internal subversion or foreign aggression.") Moreover, the statement in the concurring opinion below that because Brown was a temporary employee he could not assert a Due Process claim for improper application of E.O. 10450[7] is in direct conflict with this Court's holding that temporary employees may bring a Due Process claim under these circumstances. *See* Vitarelli v. Seaton, 359 U.S. 535, 539 (1959). Certainly for purposes of this proceeding, Brown's Due Process claim is, and must be deemed to be, substantively

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7. *See* App. at 12-13 (concurring opinion of Holcomb-Hall, J.).

meritorious.[8]

A. The Ninth Circuit's position that the CSRA preempts equitable claims by federal employees is in conflict with the repeated and contrary holdings of the District of Columbia Circuit.

For over a decade, the District of Columbia Circuit has expressly and repeatedly held that the CSRA does **not** preempt claims by federal employees for equitable relief from constitutional violations that occur in the course of employment. *See* Borrell v. United States

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8. Parenthetically, the substantive merits of Brown's Due Process claim were attacked by the Secretary through a motion for summary judgment, filed with the motion to dismiss on preemption grounds. The trial court did not reach the summary judgment motion, and could not have granted it in any event since it was premised on nearly a dozen material facts which were disputed by Brown.

Int'l Comm. Agency, 682 F.2d 981, 989-90 (D.C. Cir. 1982); Cutts v. Fowler, 692 F.2d 138, 140-41 (D.C. Cir. 1982); Williams v. I.R.S., 745 F.2d 702, 705 (D.C. Cir. 1984); Hubbard v. U.S. E.P.A. Admin., 809 F.2d 1, 11 (D.C. Cir. 1986), *rehearing en banc granted on other grounds* 809 F.2d 15 (1986); Nat. Federation of Fed. Employees v. Weinberger, 818 F.2d 935, 940 (D.C. Cir. 1987); Spagnola v. Mathis, 859 F.2d 223, 229-230 (D.C. Cir. 1988) (*en banc*) ("time and again this court has affirmed the right of civil servants to seek equitable [relief] in vindication of their constitutional rights").[9]

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9. It should be noted that Spagnola is not just an en banc opinion, "it is an unanimous en banc opinion, a rare bird in any circuit." McIntosh v. Turner, 861 F.2d 524, 527 (8th Cir. 1988).

In holding that the CSRA does preempt equitable claims by federal employees, the appellate panel here expressly stated that it was bound by the holding to that effect in Saul v. United States, 928 F.2d 829, 843, n. 27 (9th Cir. 1991). App. at 10-11. However, as both the panel here and the panel in Saul expressly recognized, the Ninth Circuit's belief that the CSRA preempts equitable claims is in direct conflict with the District of Columbia Circuit's holdings that there is no such preemption. *See* Saul, 929 F.2d at 843, n. 27 (citing Spagnola v. Mathis, supra, as "*Contra*"); App. at 10-11 (conceding the conflict between the Spagnola and Saul). Indeed, the conflict between the Ninth and D.C. Circuits on this issue has been noted by other courts as well. *See* Bryant v. Cheney, 924 F.2d 525, 528 (4th Cir. 1991).

One of the primary bases for this Court's certiorari jurisdiction is the resolution of conflicts between the Circuit Courts of Appeal, McElroy v. United States, 455 U.S. 642, 643 (1982), particularly where the conflict between the Circuits is irreconcilable and the issue is an important question of statutory construction. *See, e.g.*, Shapiro v. United States, 335 U.S. 1, 4 (1948).

There is more than just a facial or minor conflict involved here. The issue sub judice is the extent of the justiciable rights of federal employees. The conflict between the Ninth Circuit and the D.C. Circuit on the question is complete, and irreconcilable. The issue has been considered by the D.C. Circuit on at least 6 occasions, by the Ninth Circuit

at least twice (here and in Saul), and by the Fourth Circuit at least twice as well. *See* Pinar v. Dole, 747 F.2d 899 (4th Cir. 1984) (CSRA preempts equitable claims); Bryant v. Cheney, supra, 924 F.2d at 528 (not reaching the issue because case could be decided on other grounds, but indicating that it would overturn Pinar and find no preemption). The conflict is sufficiently complete, and sufficiently important, that resolution by this Court is warranted.

The grant of certiorari is particularly appropriate where there is a need for "a uniform rule on the point." Commissioner v. Bilder, 369 U.S. 499, 501 (1962). The need for a uniform rule on the issue raised in the case at bar is patent. There are currently some 1,747,000 competitive service employees

and another 406,000 excepted service employees[10] who, because they are within the ambit of the CSRA, are directly affected by the conflicting decisions of the Ninth and D.C. Circuits. Unless this Court resolves the issue presented herein, an employee who brings an equitable action in the District of Columbia will be able to proceed, while an employee who brings an identical action anywhere within the Ninth Circuit will not. Such contrary results are incompatible with the overarching need for uniformity in federal question cases, particularly questions relating to federal employment law. Practically speaking, if this Court does not resolve the conflict between the Circuits, the result will be forum

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10. O.P.M. Overview Report, Central Personnel Data File, December, 1992.

shopping by aggrieved federal employees, who will, naturally, file in the District of Columbia. The District of Columbia courts will, in the end, bear alone a burden that would otherwise be spread among the district courts in 50 states. For this reason alone, the grant of certiorari is fully appropriate here. When the decision of the Ninth Circuit is viewed in the context of this Court's federal employment jurisprudence, the need for certiorari is compelling.

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B. The Ninth Circuit's pronouncements on the issue sub judice ignore both this Court's direct holding in an analogous case and this Court's apparent holding in an identical case.

In holding that equitable claims are preempted by the CSRA, he Ninth Circuit purports to be following this Court's precedent. Saul, 925 F.2d at 840-843, *citing* Schweiker v. Chiliki, 487 U.S. 412 (1988), United States v. Fausto, 484 U.S. 439 (1988) and Bush v. Lucas, 462 U.S. 412 (1983). The truth of the matter, however, is that the Ninth Circuit has simply ignored applicable precedent in order to reach its desired result. There are two decisions by this Court which simply belie the Ninth Circuit position. The first is a direct holding in a case with analogous administrative provisions involving the Central Intelligence Agency.

Employment decisions by the Director of the C.I.A. are, by statute, matters of essentially unlimited discretion. *See* 50 U.S.C. § 403(c) (director may fire any employee "whenever he shall deem such termination necessary or advisable in the interests of the United States.") In Webster v. Doe, 486 U.S. 592 (1988), a clerk-typist was fired by the C.I.A. because of his sexual orientation. The termination did not comply with the procedures set out in the CSRA. The employee brought claims for both violation of the provisions of the CSRA and for equitable relief as to constitutional violations. The Director argued that the discretion afforded him by 50 U.S.C. § 403(c) preempted administrative/ judicial review of his actions even when such review was otherwise provided for under

the CSRA. The Court agreed. Webster v. Doe, supra, 486 U.S. at 600-601. However, the Court expressly rejected the Director's argument that the employee's claims for equitable relief, premised on Due Process violations were likewise preempted, because of the "'serious constitutional question' that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claims." Webster, supra, 486 U.S. at 603, quoting Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667, 681, n. 12 (1986).

Webster holds that even the extensive discretion which national security statutes expressly establish for C.I.A. employment decisions cannot preclude equitable constitutional claims by employees. The holding in Webster cannot

be reconciled with the Ninth Circuit's decision that the far less imperative needs underlying the CSRA preempt such claims.

Nor can it be claimed that the Court below could have believed Webster is inapplicable to the question here; such a claim is untenable given this Court's subsequent jurisprudence. As noted earlier, the Fourth Circuit initially held, like the Ninth Circuit here, that the CSRA preempts equitable constitutional claims. Pinar v. Dole, supra, 747 F.2d at 912. Later, a trial court dismissed a federal employee's equitable claims in reliance on Pinar's holding that such claims are preempted. The Fourth Circuit affirmed on appeal. *See* Bryant v. Carlucci, 838 F.2d 465 (4th Cir. 1987). However, that judgment was vacated by this

Court, which expressly remanded the case for "reconsideration in light of Webster v. Doe." Bryant v. Carlucci, 488 U.S. 806 (1988).

With its summary reversal in Bryant v. Carlucci, this Court made plain that Webster controls the question of CSRA preemption of equitable claims.[11] This was repeatedly pointed out to the Ninth Circuit in the case at bar[12], to no avail. Bluntly, the court below preferred its own precedent in Saul to the holding of this Court in Webster and, later, in Bryant v. Carlucci. Ordinarily, the appropriate

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11. The fact that Bryant v. Carlucci, supra, was a summary disposition does not mean that it can be blithely ignored by the Ninth Circuit. Hicks v. Miranda, 422 U.S. 332, 344 (1975) ("lower courts are bound by summary decisions by this Court.")

12. *See* Appellant's Reply Brief at 11-12; Petition for Rehearing at 7-10.

response by this Court would be summary reversal. *See, e.g.*, S.E.C. v. Otis & Co., 338 U.S. 843 (1949). However, because the decision below is unpublished, summary reversal will not provide the direct precedent apparently necessary to bring the Ninth Circuit into line with this Court's views.

The Fourth Circuit recognizes that this Court's decisions in Webster v. Doe, supra, and Bryant v. Carlucci preclude finding CSRA preemption of equitable claims, while the Ninth Circuit seems to believe that they do not. As discussed above, the issue here is recurrent and of considerable importance. Given the Ninth Circuit's apparent reluctance to accept this Court's pronouncements on the issue, full consideration and decision is the best way to end the apparently "discordant

views in the Circuits regarding the proper application [of Webster and Bryant]." United States v. Gaddis, 424 U.S. 544, 547 (1976).

VI. CONCLUSION

The issue presented, which involves the rights of all federal employees and jurisdiction of all federal courts, is one of national scope. It is by nature a question where uniformity of decision is of great importance and the same question has repeatedly been before the lower courts. The decision of the Ninth Circuit in the case at bar is in complete conflict with the repeatedly reaffirmed holdings of the District of Columbia Circuit on precisely the same issue, and is also in apparently direct conflict with this Court's precedent.

For all of the above-stated reasons, petitioner Wilbur Brown respectfully requests that a writ of certiorari issue, and that the decision of the Ninth Circuit be subject to full consideration and appropriate disposition by this Court.

Respectfully Submitted,

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